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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MELINDA A. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF
SAN DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D062314

(San Diego County
Super. Ct. No. NJ12336C)

Proceedings for extraordinary relief after reference to a Welfare and Institutions Code section 366.26 hearing. Blaine K. Bowman, Judge. Petitions denied; requests for stay denied.

Melinda A. and Colin J. (together, the parents) petition for writ review of juvenile court orders granting a Welfare and Institutions Code¹ section 388 petition filed by counsel for their daughter, Alexis J., to terminate their reunification services and refer the matter to a section 366.26 hearing. Melinda contends that the court abused its discretion by granting the petition. She argues that the fact that she has married Colin during the pendency of this case does not constitute changed circumstances within the meaning of section 388, and that terminating her parental rights was not in Alexis's best interests. Colin asserts that reversal is required because the evidence was insufficient to support the court's findings. Each parent joins in the arguments of the other to the extent that those arguments inure to his or her benefit. We deny the petitions and deny the requests for a stay of the proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On July 19, 2011, the Agency petitioned on behalf of two-year-old Alexis under section 300, subdivision (b) on the basis of the parents' drug use, and because marijuana had been found in the family home. Also, Colin had been arrested both in April and in July with marijuana and drug paraphernalia in his car. Alexis was in the car at the time of the first arrest; Melinda was in the car during the second incident. The petition additionally alleged that both parents had significant and lengthy histories of drug abuse, and that both parents admitted that they were currently using marijuana.

¹ Statutory references are to the Welfare and Institutions Code.

At the time of the April traffic stop, police found marijuana and five hypodermic needles in the car. One needle appeared to contain heroin. Colin admitted that he had a 12-year history of using heroin and that he had smoked it the previous day. In July, he was arrested in his car for possessing marijuana, but was released the following day when he produced a medical marijuana card.

Melinda said that she began using methamphetamine and alcohol when she was 14. Colin also began his drug use at age 14. He started using heroin at age 15. The social worker said that both parents minimized their drug use.

At the jurisdictional and dispositional hearing on August 9, 2011, the court found the allegations true. The court ordered Alexis placed in relative care and ordered the parents to comply with their case plans, which included therapy, parenting education, outpatient substance abuse treatment and drug testing.

Melinda maintained steady employment. She began twice weekly substance abuse treatment in September 2011, started therapy in December, and began parenting education in January 2012. Colin did not participate in any services. In November 2011, he was arrested, charged with second degree burglary and incarcerated. The social worker reported that the parents appeared to be trying to avoid contact with the Agency, and Colin admitted that this was so. Melinda told the social worker that she and Colin were no longer together, yet she continued to visit him at the jail and remained in the home that she had shared with him.

At the six-month review hearing on February 9, 2012, the court found that Melinda had made substantive progress with the provisions of her case plan, but that

Colin had not made substantive progress. The court ordered six more months of services for the parents and set an interim review hearing for a date after Colin's release from custody, which was scheduled for February 14.

The social worker reported that in March 2012, Melinda told her that she and Colin were not living together, but that they were working things out. However, the social worker subsequently learned that Melinda and Colin had married on February 27.

In April the social worker met with Colin and his probation officer. Colin admitted having used heroin three days earlier and acknowledged that he and Melinda had gotten married, and that he had had contact with Alexis despite knowing there was a no contact order between them. Because Colin had not been attending Narcotics Anonymous/Alcoholics Anonymous (NA/AA) meetings, had not begun treatment, continued to use heroin, and had violated the no-contact order, Colin's probation officer decided that he should be returned to custody.

Melinda's therapist said she was very surprised to learn that Melinda and Colin had gotten married. During therapy, Melinda had claimed the only contact she had with Colin was to transport him to and from his treatment program.

On May 7, 2012, Alexis, through her counsel, petitioned under section 388, requesting modification of the February 9 order continuing the parents' services to the 12-month date. The petition pointed to the fact that the parents had married, and that Melinda lied to her therapist about her relationship with Colin. In addition, the petition noted that after Colin's release from custody, Melinda started missing visits and was not

complying with her services plan, and Colin had not participated in services, had violated probation and continued to use drugs.

At the hearing on the section 388 petition on July 11, 2012, the social worker's supervisor testified that Colin and Melinda had attended a gathering with Alexis's paternal relatives in July despite a no-contact order between Colin and Alexis. The supervisor said that Melinda had completed a six-month drug rehabilitation program with no positive drug tests, and that she had also completed parenting education classes and was continuing in therapy. The social worker explained that Melinda's visits with Alexis continued to be supervised because Melinda maintained a strong relationship with Colin. Melinda had done well when Colin was in jail, but her visits with Alexis decreased in frequency after he was released. The social worker expressed concern that Melinda had not been honest with her therapist about her relationship with Colin, and that Colin had not made any progress in services.

Alexis's paternal grandmother testified that she knew there was a no contact order between Colin and Alexis, but believed the order was unclear.

After considering the testimony, other evidence and argument by counsel, the court found that there had been a change in circumstances and that the requested modification was in Alexis's best interests. The court terminated reunification services and scheduled a section 366.26 hearing.

Melinda and Colin petition for review of the court's orders. (§ 366.26, subd. (l); Cal. Rules of Court, rule 8.452.) This court issued an order to show cause, the Agency and Alexis responded, and the parties waived oral argument.

DISCUSSION

Melinda contends that the juvenile court abused its discretion by granting the section 388 petition. She maintains that her marriage to Colin does not constitute changed circumstances within the meaning of section 388, and that terminating her services was not in Alexis's best interests. Colin asserts that the evidence was insufficient to support the court's findings.

Section 388, subdivision (c)(1)(B) provides that a party may petition the court to terminate court-ordered reunification services before a scheduled section 366.21 hearing if "[t]he action or inaction of the parent . . . creates a substantial likelihood that reunification will not occur, including, but not limited to, the parent['s] . . . failure to visit the child, or the failure of the parent . . . to participate regularly and make substantive progress in a court-ordered treatment plan."

A reviewing court must uphold a juvenile court's findings and orders if they are supported by substantial evidence. (*In re Amos L.* (1981) 124 Cal.App.3d 1031, 1036-1037.) "[W]e must indulge in all reasonable inferences to support the findings of the juvenile court [citation], and we must also' . . . view the record in the light most favorable to the orders of the juvenile court.' [Citation.]" (*In re Luwanna S.* (1973) 31 Cal.App.3d 112, 114.) The appellant bears the burden to show the evidence is insufficient to support the court's findings. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

The decision whether to grant a section 388 petition is addressed to the sound discretion of the juvenile court, and the court's decision will not be disturbed on appeal in the absence of a clear abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

A proper exercise of discretion is " 'neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

Alexis was taken into protective custody in July 2011 because of her parents' drug use, after law enforcement officers found marijuana and drug paraphernalia in the home and Melinda and Colin admitted smoking marijuana. Both parents had long histories of drug abuse and lengthy criminal histories. Melinda had lost custody of her older children. Both parents had a slow start with their services. However, while Colin was incarcerated, Melinda began to participate in services. She started substance abuse treatment in September, therapy in December and parenting education in January 2012. In addition, she maintained steady employment. However, when Colin was released from custody, Melinda and Colin married and she started missing visits. Her participation in services also diminished after Colin's release from custody. Once released, Colin continued to use drugs. He admitted to his probation officer that he had recently used heroin and had been avoiding the social worker.

There is substantial evidence to support the court's finding of a change of circumstances. Melinda was dishonest when she did not disclose to her therapist her recent marriage to Colin. Melinda's therapist said she was "floored" when she learned that Melinda and Colin had married because Melinda had told the therapist that the only contact she was having with Colin was to transport him to and from his substance abuse

program. The therapist said that Melinda's failure to be honest with her would impede therapy.

The court noted that after Colin was released from custody, Melinda appeared to lose interest in complying with her case plan and attempting to reunify with Alexis. The court stated:

"[T]he court notes that since [Colin's] release from custody -- [Melinda] appeared to have been doing very well in her services, but since that time seems to have been tapered off because she perhaps may be more focused on her relationship with [Colin] than reunifying with [Alexis]."

The court's finding of a change of circumstances is well supported by substantial evidence.

The court did not abuse its discretion by finding that terminating services was in Alexis's best interests. At the time of the hearing, Alexis was just three years old and had been in the dependency system for almost a full year. The parents had been offered services to help them be able to provide a safe home for her, but Colin made no progress, and although Melinda had been participating in services, she was focused more on her relationship with Colin than with reunifying with Alexis.

In *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530-532, the appellate court listed three factors that a court may consider in determining whether a child's best interests would be served by granting a section 388 petition: (1) the seriousness of the problem that led to the dependency and the reasons for any continuation of the problem; (2) the strength of the bond between the child and the caretaker; and (3) the degree to which the problem may be removed and the degree to which it has been removed.

Colin's and Melinda's drug addictions were serious problems. Colin began using marijuana at 14 and by age 18, he was using heroin every day. He was incarcerated off and on during the dependency and did not begin drug treatment until May 2012. Melinda had begun using drugs at age 14, and, although she had completed treatment in the past, continued to use drugs. Melinda attended therapy, but was not truthful with her therapist about her relationship with Colin, which called into question the extent of her progress in therapy. Although the parents shared a bond with Alexis, their lack of progress in removing the problems that led to the dependency show that the court did not abuse its discretion by granting the section 388 petition and terminating reunification services.

DISPOSITION

The petitions are denied. The requests for stay are denied.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.